Filed 6/29/09 Bergen v. Morphy, Pearson, Bradley & Feney CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WILLIAM A. BERGEN, Plaintiff and Appellant, v. MURPHY, PEARSON, BRADLEY & FEENEY, P.C., et al., Defendants and Respondents.	B201217 (Los Angeles County Super. Ct. No. BC338494)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Thornton House, Judge. Affirmed.

Law Offices of William A. Bergen and William A. Bergen, in pro. per., for Plaintiff and Appellant.

Robie & Matthai, Edith R. Matthai and Steven S. Fleischman for Defendants and Respondents.

Plaintiff, Attorney William A. Bergen, appeals in pro. per. from summary judgment granted to defendants, Attorney James Anthony Murphy and his law firm, Murphy, Pearson, Bradley & Feeney, P.C., in plaintiff's action for legal malpractice and breach of fiduciary duty.[1] We find no error in the trial court's determination that the plaintiff had established no provable claim for damages, and therefore his action lacked merit. We affirm the judgment.

FACTS

Plaintiff represented a couple named Tur, and their business, Los Angeles News Service (LANS), as plaintiffs in several copyright cases. Thereafter in 2001 the Turs discharged plaintiff, and then sued him for malpractice, demanding compensatory damages of $1.45 million (malpractice case). Plaintiff's insurer, Zurich-American Insurance Group (Zurich), engaged defendants to defend plaintiff. Defendants also filed a cross-complaint for indemnity against another law firm (Oberstein), which had represented the Turs with plaintiff in an appeal (*KCAL*) in which statutory attorney fees were denied because of failure to claim them in the brief, as required by court rule. This constituted one of the Turs' malpractice claims against plaintiff.

Contemporaneously, plaintiff, in pro. per., sued the Turs for fees and costs they allegedly owed him for six matters in which he had represented them (fees case). One of these was *Oberstein v. Tur*, in which Oberstein recovered $47,614 in *KCAL* fees after plaintiff negligently omitted to plead Oberstein's malpractice as an affirmative defense. In another case, *Reuters*, plaintiff had obtained reversal of a defense summary judgment, and the trial court had awarded the Turs attorney fees of $60,252, which they were paid but withheld from plaintiff.

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[1] Plaintiff also purports to appeal from (1) the order denying his motion for new trial, which is not appealable but is reviewable on the appeal from the judgment, and (2) several other items, of which only a postjudgment order re costs is appealable. Plaintiff makes no contention regarding that order. Except insofar as it addresses the judgment, the appeal is dismissed.

The fees case was consolidated with the malpractice case, but defendants represented plaintiff only in the latter. Ultimately both cases settled during trial. In the malpractice case, Zurich paid the Turs $150,000. For the fees case, the Turs paid plaintiff $100,000. Another $10,000, constituting the indemnity settlement with Oberstein, was paid $2,500 to plaintiff and $7,500 to the Turs, thus enlarging their recovery. The payment to plaintiff compensated for his $2,500 Zurich deductible, of which he had paid $1,700.

In August 2005, plaintiff commenced the present malpractice action, against defendants. In addition to defendants, the complaint named several others who are not parties to the judgment or this appeal, including Zurich. In a cause of action for professional negligence, plaintiff alleged that defendants (1) repeatedly pressured plaintiff, during trial, to settle the fees case for $20,000, a fraction of its worth, so as to permit Zurich to settle the malpractice case; (2) failed to respond to discovery and prepare for trial; (3) did not retain an economics expert to contest the Turs' damage claim; (4) recommended to Zurich a settlement that "was adverse to [plaintiff's] interest in protecting his professional reputation"; (5) recommended that Zurich send plaintiff a pressuring letter, which cited a policy provision permitting Zurich to withdraw from the defense if its expenditures and the amount for which the case could be settled together exceeded the $500,000 coverage; and (6) prepared and presented releases in the malpractice and indemnity cases that specifically covered Zurich and defendants themselves. The other cause of action against defendants, for breach of fiduciary duty, essentially restated the foregoing charges. For each claim, plaintiff prayed $335,630 damages, an amount that allegedly would have been recoverable from the Turs beyond the $100,000. On the fiduciary duty cause of action, plaintiff claimed damages for emotional distress, and also sought punitive damages.

Defendants moved for summary judgment, or for summary adjudication of each cause of action, based on plaintiff's inability to prove damages. With respect to the malpractice claim regarding a diminished settlement in the fees case, defendants argued that plaintiff could not recover damages under the requirements of "settle and sue"

decisions, which hold that a party claiming that a settlement it made was adversely affected by malpractice cannot recover if the settlement was within the realm of reasonableness. (E.g., *Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1462, fn. 13.) With respect to the fiduciary duty allegations, defendants argued that most of the complaint's assertions did not implicate such duties, and that plaintiff also could not show damages.

In his opposition, plaintiff contended principally that the "settle and sue" analysis was inapposite, but that he could show damages even if it applied.

The trial court granted the motion for summary judgment, ruling that the settlement had been within the realm of reasonableness, and that it was speculative whether plaintiff could have received more. Plaintiff noticed a motion for new trial, and tendered deposition testimony regarding alleged fiduciary breaches after the settlement. The court denied the motion.

DISCUSSION

A. The Summary Judgment Motion.

We review the grant of summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (*Saelzler*). In so doing, we follow the rules set forth in Code of Civil Procedure section 437c (undesignated section references are to that code), as explicated in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 (*Aguilar*). To obtain summary judgment, defendants had to show either that one or more elements of plaintiff's claims could not be established – in the instant case, damages – or that there existed a complete affirmative defense to those claims. (§ 437c, subds. (a), (o)(1), (o)(2), (p)(2).) Defendants could do this by advancing evidence that either negatived the claim or element, showed that plaintiff had insufficient evidence to establish it, or established the complete defense. (*Ibid.*) Defendants bore the burden of persuading the court to this effect. (*Aguilar*, at p. 850.)

Defendants also had the initial burden of producing evidence sufficient to make a prima facie showing, i.e., one that would require a trier of fact to find in their favor, more likely than not, on the issue in question. (*Aguilar*, *supra*, 25 Cal.4th at pp. 850-851.) If they did, the burden shifted to plaintiff, to produce evidence establishing a triable issue of material fact, i.e., a prima facie case that would support a jury finding in plaintiff's favor under the applicable burden of proof. (*Ibid.*) In determining whether these burdens were met, we view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing his evidence while strictly scrutinizing defendants'. (*Id.* at p. 856; *Saelzler, supra,* 25 Cal.4th at p. 768.)

1. Procedural Issues.

Plaintiff raises two preliminary contentions concerning the summary judgment proceedings. First, he asserts that the trial court erred in overruling most of his evidentiary objections to defendants' evidence. Plaintiff does not state or argue these objections, or the issues they presented, but rather simply incorporates the objections by reference, and invites us to rule on them anew. This type of advocacy is insufficient under the appellate rules, which require that points be argued in the briefs, with citation of authority if possible. (Cal. Rules of Court, rule 8.204(a)(1)(B); see *Parker v. Wolters Kluwer U.S., Inc.* (2007) 149 Cal.App.4th 285, 290.) By failing to brief this contention, plaintiff has waived it.

Second, plaintiff contends that summary judgment should have been denied because his response to defendants' separate statement of undisputed material facts (§ 437c, subds. (b)(1), (b)(3)) asserted that many of those facts were disputed, in whole or in part. Plaintiff does not specify these facts or explain their materiality. He contends simply that a responding party's disavowal of the moving party's "material facts" requires that a summary judgment motion be denied.

The authorities plaintiff cites show the fallacy of his claim. A "Practice Pointer" at paragraph 10:95.1, page 10-35 of Weil & Brown, Cal. Practice Guide: California Civil Procedure Before Trial (Rutter 2008) states that summary judgment must be denied "if a

triable issue is raised as to any of the facts in [the] separate statement . . . ." But claiming a fact to be disputed and actually raising a triable issue as to that fact are not the same thing. A responding party's separate statement will often claim "disputes" that are verbal, or trivial, or unsupported by the evidence. Moreover, simply listing a fact in the separate statement does not necessarily render it material, in the dispositive sense. "To be 'material' for purposes of a summary judgment proceeding, a fact must . . . be essential to the judgment in some way." (*Riverside County Community Facilities Dist. No. 87-1 v. Bainbridge 17* (1999) 77 Cal.App.4th 644, 653.) Moving parties often include in their separate statements facts that are background, or illustrative, or irrelevant, but not critical. As Weil and Brown also note, the trial court will review the evidentiary support "[i]f the opposing statement disputes *an essential fact* alleged in support of the motion . . . ." (Weil & Brown, *supra*, ¶ 10:94.1, p. 10-34 (italics added); accord, *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1248.)[2]

Thus, plaintiff's claim that his disputes of the separate statement automatically required denial of the summary judgment motion is unfounded.

2. The Test for Settlement Damages.

The trial court adversely adjudicated plaintiff's primary claim, that defendants' malpractice had negatively affected the settlement of the fees case, on the basis that plaintiff had not shown a triable issue of damages. The court applied the test of various so-called "settle and sue" cases, that establishing damages requires proof that the settlement was not "within the realm of reasonableness. [Citation.]" (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528.) Plaintiff disputes the applicability of this test, on grounds the present case is neither against lawyers who procured the settlement,

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[2] These points are manifest in the regular practice of granting summary judgments where one or more "material facts" in the separate statement has been dubbed "disputed." And it is extremely rare for at least one or more of the moving party's facts not to be so disputed.

nor brought in opposition to a claim for attorney fees. These distinctions are not material, and the rationales of the "settle and sue" damages standard do apply here.

The so-called "settle and sue" rule of damages is founded and illustrated by various decisions. For example, in *Barnard v. Langer, supra,* 109 Cal.App.4th 1453, the court affirmed a nonsuit on a legal malpractice claim "on the ground that, assuming negligence, the plaintiffs' damages were too speculative . . . ." (*Id.*. at p. 1455.) The court found only speculative harm because the plaintiff had not shown that but for his attorney's negligence the underlying case would have settled for more than it did, or produced a better recovery upon trial. The court stated that the mere probability of an event occurring will not support a claim for damages. (*Id*. at p. 1462.) The court approvingly quoted the suggestion of a leading text that "'The standard should be whether the settlement is within the realm of reasonable conclusions, not whether the client could have received more or paid less.'" (*Id.* at p. 1463, fn. 13.)

Other cases have ruled similarly. *Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052 mandated summary adjudication of a malpractice claim arising out of a settlement, because the plaintiff offered no evidence that his ex-wife would have settled for less than she did, or that he would have obtained a more favorable judgment from trial. (*Id.* at pp. 1057-1058; see also *Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1518-1519.) And *Slovensky v. Friedman, supra,* 142 Cal.App.4th 1518, 1528, also a settlement malpractice case, paraphrased *Barnard v. Langer*, *supra*, 109 Cal.App.4th 1453, to the effect that "To win a legal malpractice action, the plaintiff must prove damages to a legal certainty, not to a mere probability [Citation.] Thus, a plaintiff who alleges an inadequate settlement . . . must prove that, if not for the malpractice, she would certainly have received more money in settlement or at trial. [Citation.] . . . [The attorney is] held only to the standard of whether the settlement was within the realm of reasonableness. [Citations.]"

These decisions did involve claims against attorneys who had shepherded the settlement of the underlying cases, and some also included a cross-complaint for fees.

But neither element renders the articulated tests inapposite to the present case, which allege that malpractice by plaintiff's attorney in a consolidated case forced plaintiff to enter into an unreasonably low settlement of the other case. Both the general rules of damages that the "settle and sue" cases expound and apply, and their particular rules about the assessment of settlements, are fully apposite to the presently postured action, literally a "settle and sue" case too. The trial court did not err in applying the cases and principles cited above.

3. Application of the Test to Plaintiff's Settlement.

Plaintiff contends that, even granting the applicability of the standard reviewed above, there was a triable issue that his $100,000 settlement of the fees case was not "within the realm of reasonableness" (*Slovensky v. Friedman, supra,* 142 Cal.App.4th at p. 1528) as related to what he could have recovered. Plaintiff relies principally on his own declaration in opposition to the summary judgment motion.

In the declaration, plaintiff claimed that during mediation proceedings before trial, the Turs offered $150,000 in settlement of the fees case, to which he was amenable. This testimony, however, was inadmissible under Evidence Code section 1119, subdivision (a), which strictly excludes statements made in the course of a mediation.

As a second contrast to the ultimate $100,000 settlement, plaintiff claimed that he could assuredly have recovered from the Turs fees and unreimbursed costs of approximately $150,000, for only some of the matters for which he sued – namely, about $60,000 fees and $39,000 costs for the *Reuters* case; $22,000 fees for the *Pursuit* case; and $29,000 for costs in cases besides *Reuters*. In addition, plaintiff claimed the following approximate amounts for the remaining cases: $85,000 in quantum meruit for *Westinghouse*; $164,000 by the same measure for *CBS*; $32,000 "in assumpsit" for *Oberstein v. Tur*, in which plaintiff defended the Turs against a fee claim, failed to allege malpractice as a defense, and the Turs suffered an adverse judgment of over $47,000; and $3,864, for *NBC* (negotiations).

There are, however, further facts that reduce these claims substantially. First, plaintiff was not allowed, as a pleading matter, to claim any fees for *Oberstein* – with respect to which he could not in any event have expected to recover what he demanded. Thus, for present purposes that claim was not likely to produce anything.

Second, plaintiff generally represented the Turs under a contingent fee agreement, calling for a maximum fee of one-third of the recovery. Under *Fracasse v. Brent* (1972) 6 Cal.3d 784, 791-792, plaintiff became entitled upon his discharge to recover the reasonable value of his services (quantum meruit), but only if the contingency, recovery by the Turs, occurred. Therefore, plaintiff was not entitled to fees for the *Westinghouse* case, in which the Turs did not recover either.

Third, plaintiff's claim of $164,000 for the *CBS* case exceeded his maximum potential fee in several respects. First, plaintiff's "quantum meruit recovery [could not] exceed the amount he would have been paid under the contingent fee provision of the contract." (*Selten v. Hyon* (2007) 152 Cal.App.4th 463, 472, fn. 2.) In *CBS*, under a contract retaining the Tyre, Kamins firm as co-counsel, the fee was 33 percent of the $260,000 recovery, or $85,800, and that was to be divided evenly between the firms. Hence, plaintiff's maximum possible fee for *CBS* was $42,900.

Accordingly, the maximum fees plaintiff could have recovered were $60,250 for *Reuters*, $42,900 for *CBS*, $22,475 for *Pursuit*, and $3,684 for *NBC*, or a total of $129,309. Plaintiff's claimed costs, including those for *Westinghouse* but not those for *Oberstein v. Tu* [3] amounted to approximately $64,000.

Considering the potential damages for fees, as defendants do, as a matter of law plaintiff's $100,000 settlement was clearly within a reasonable range of the maximum that he could properly have recovered ($129,309). Adding 100 percent of plaintiff's claimed costs ($64,000) produces a total of $193,309. But that is a theoretical maximum,

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[3] Plaintiff was denied leave to amend his complaint to add his *Oberstein* claim to the fees case. He claimed about $4,600 costs for *Oberstein*.

which does not take into account, as would any settlement, uncertain factors that inevitably reduce a pleaded claim when compromised. One of these factors is the likelihood that the amount would be collectible, a necessary element of a legal malpractice claim. (*Campbell v. Magana* (1960) 184 Cal.App.2d 751, 754.)[4] Another is the prospect that the jury simply would not have accepted plaintiff's claims 100 percent. (See *Barnard v. Langer*, *supra*, 109 Cal.App.4th at p. 1461.)

In light of these factors, and for the reasons set forth in *Barnard v. Langer*, *supra*, 109 Cal.App.4th at pages 1462-1463, plaintiff failed to establish a triable issue that his $100,000 settlement was beneath the range of reasonableness, or that he would have recovered more through trial or settlement, absent the alleged impact of defendants' negligence on the fees case.

4. Fiduciary Duty Claims.

Plaintiff also contends that summary adjudication was improperly granted with respect to several allegations of breach of fiduciary duty, arising from violations of the Rules of Professional Conduct (cited hereafter as rules). The most provocative of these arose from evidence that defendants drafted and presented to plaintiff settlement agreements that included releases of both Zurich and defendants themselves. With respect to defendants, such a release was forbidden by rule 3-400(A), which provides that "A Member shall not . . . [c]ontract with a client prospectively limiting the member's responsibility to the client for the member's professional malpractice." Furthermore, defendants' advancement of the release as to Zurich may have violated rule 310(C)'s proscription of representing adverse interests.

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4 Although the escrowed settlement of $260,000 in the *CBS* case provided a fund for payment of plaintiff's $100,000 settlement, the Tyre, Kamins firm also had a substantial interest in that fund. As plaintiff's hypothesized recovery might enlarge, its assurance of collection would diminish.

However, once more plaintiff did not show recoverable damages. He protested the proposed releases, and those provisions were removed. Plaintiff identified no specific damages from the attempted violation of rule 3-400(A). He declared only that, overall, redrafting and negotiating the settlement agreements "cost me valuable attorney time of approximately 35 hours . . . ." But plaintiff's provision of legal services to himself was not compensable. (*Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 494.)

A second claim of fiduciary breach concerned the settlement of plaintiff's cross-complaint for indemnity against Oberstein, which defendants prosecuted and resolved. From both sides' rather awkward accounts, it appears that plaintiff had been promised repayment of his $2,500 Zurich deductible from the proceeds. The case settled for $10,000, and plaintiff was paid the $2,500, even though he had paid Zurich only $1,700 of that deductible amount. The rest of the settlement went to the Turs, augumenting their $150,000 settlement payment by Zurich. Plaintiff thus received what he was promised. He did not show any damages stemming from defendants' assigning part of the Oberstein settlement or having failed to disclose that assignment.

B. The Motion for New Trial.

Plaintiff's motion for new trial was grounded in part on three deposition transcripts, of defendant Murphy, his associate Linn, and Zurich adjuster Toti, which plaintiff asserted were newly discovered evidence under section 657, subdivision 4. Plaintiff claimed that this testimony fortified his assertions of breach of fiduciary duty. It did not change the result, however, because plaintiff offered no evidence curing the absence of damages. Although plaintiff did argue that he could recover emotional distress damages, he never presented any evidence, direct or reasonably inferential, of such damages.

The motion for new trial also argued that the trial court had erroneously assessed plaintiff's entitlement to fees for several cases, namely *Reuters, Pursuit,* and *CBS.* Plaintiff contended a proper appraisal would have yielded a potential recovery with

respect to which plaintiff's $100,000 settlement was not in the realm of reasonableness. These claims, too, were and remain unavailing. Plaintiff's claim for *CBS* included the same amount the trial court had utilized. With respect to *Reuters*, plaintiff argued that $39,173 of costs should have been considered. That amount, however, has been included in this court's calculations, presented above, with no change in the result.

With regard to *Pursuit*, plaintiff sought to abandon the $22,000 fee amount that he had claimed throughout the case – from his complaint through interrogatory answers to an admission in response to the separate statement – and substitute a $99,000 fee, the ostensible product of a contingency. Some, but not all, of plaintiff's admissions of the $22,000 amount had included the notation, "if value of contingency is not applied." But the parties and the court had consistently employed the $22,000 amount, which plaintiff's bill to the Turs showed. Plaintiff's new trial effort to inflate that amount to four and one-half times the original sum was impermissible. (See *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 396.)

DISPOSITION

The judgment is affirmed. Defendants shall recover costs.

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BAUER., J.*

We concur:

FLIER, Acting P. J. BIGELOW, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.